

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 25, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP2  
STATE OF WISCONSIN**

**Cir. Ct. No. 2011CV15363**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN EX REL. JERMAINE J. FUNCHES,**

**PETITIONER-APPELLANT,**

**V.**

**JUDY P. SMITH, WARDEN,  
OSHKOSH CORRECTIONAL INSTITUTION,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
CARL ASHLEY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Jermaine J. Funches, *pro se*, appeals a circuit court order denying his petition for a writ of *habeas corpus*. Funches asserts that his postconviction counsel gave him constitutionally ineffective assistance following his conviction for armed robbery. The circuit court denied relief, concluding that

Funches should have filed his petition for a writ of *habeas corpus* in the court of appeals pursuant to *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). We affirm on an alternate ground: Funches is not entitled to a writ because he asserts claims previously resolved in an earlier postconviction proceeding.

¶2 A jury found Funches guilty of one count of armed robbery by threat of force. Funches pursued a direct appeal under the no-merit procedure described in WIS. STAT. RULE 809.32 (2009-10). See *State v. Funches*, No. 2010AP359-CRNM, unpublished op. and order (WI App Aug. 11, 2010) (*Funches I*).<sup>1</sup> In that proceeding, his appellate counsel discussed numerous possible claims of error and explained why counsel believed that they lacked arguable merit. Funches responded to the no-merit report and also proposed additional claims that he believed were arguably meritorious. This court disagreed with Funches and summarily affirmed his conviction, concluding that further appellate proceedings would be frivolous. See *id.* at 4. We subsequently denied his motion for reconsideration.

¶3 Funches next returned to the circuit court *pro se* and filed the petition for a writ of *habeas corpus* underlying this proceeding. He contended that his trial counsel was constitutionally ineffective and that his postconviction

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<sup>1</sup> We take judicial notice of the proceedings in *State v. Funches*, No. 2010AP359-CRNM, unpublished op. and order (WI App Aug. 11, 2010) (*Funches I*). “Generally, a court may take judicial notice of its own records and proceedings for all proper purposes. This is particularly true when the records are part of an interrelated or connected case, especially where the issues, subject matter, or parties are the same or largely the same.” *Johnson v. Mielke*, 49 Wis. 2d 60, 75, 181 N.W.2d 503 (1970).

All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

counsel was constitutionally ineffective in turn by failing to file a postconviction motion in the circuit court alleging trial counsel's ineffectiveness.

¶4 The “[w]rit of *habeas corpus* is an equitable remedy that protects a person’s right to personal liberty by freeing him or her from illegal confinement.” *State v. Pozo*, 2002 WI App 279, ¶8, 258 Wis. 2d 796, 654 N.W.2d 12. Whether the writ is available to a person seeking relief is a question of law that we review *de novo*. *Id.*, ¶6.

¶5 Our supreme court requires convicted defendants to petition the court of appeals for a writ of *habeas corpus* to pursue claims that appellate counsel was ineffective. *Knight*, 168 Wis. 2d at 522. A petition under *Knight*, however, “is not the proper vehicle for seeking redress of the alleged deficiencies of postconviction counsel.” *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 679, 556 N.W.2d 136 (Ct. App. 1996). Rather, “a claim of ineffective assistance of postconviction counsel should be raised in the [circuit] court either by petition for *habeas corpus* or a motion under [WIS. STAT. §] 974.06.” *Rothering*, 205 Wis. 2d at 681 (italics added; footnote omitted).

¶6 The circuit court examined the claims in Funches’ writ petition and concluded that Funches alleged appellate counsel’s ineffectiveness. Therefore, the circuit court denied relief on the ground that he should have filed the petition in the court of appeals. Neither party now disputes, however, that the petition alleges postconviction counsel’s ineffectiveness. *Cf. id.* at 679 (defendant challenges effectiveness of postconviction counsel when allegedly deficient conduct is failure to file postconviction motion in circuit court). We assume, as do the parties, that Funches properly raised his claims in the circuit court.

¶7 The State argues that we should nonetheless affirm the circuit court order denying Funches a writ because he sought in his petition to relitigate claims of ineffective assistance of counsel previously litigated in *Funches I*. “[I]n a postconviction setting, a petition for writ of *habeas corpus* will not be granted where ... the petitioner asserts a claim that was previously litigated in a prior appeal or motion after verdict.” *Pozo*, 258 Wis. 2d 796, ¶9. Upon review of the record and the proceedings in *Funches I*, we agree with the State. See *State v. Amrine*, 157 Wis. 2d 778, 783, 460 N.W.2d 826 (Ct. App. 1990) (an appellate court may sustain a circuit court’s holding for reasons not presented to the circuit court).

¶8 The two-pronged test for claims of ineffective assistance of counsel requires the claimant to show that counsel’s performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Further, to demonstrate, as Funches wishes to do, that postconviction counsel was ineffective for failing to allege trial counsel’s ineffectiveness, a defendant must show that trial counsel was actually ineffective. See *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶9 Funches asserts in his writ petition that his trial counsel was ineffective by failing to: (1) “advise Funches correctly that he was entitled to a lesser-included [jury] instruction”; (2) take the steps necessary to show that a police detective who investigated the charges against him “lied at the [suppression] hearing and at trial”; and (3) object to the State’s “unconstitutional[] suppress[ion]” of exculpatory evidence allegedly captured on a surveillance tape. Funches’ response to the no-merit report filed in *Funches I* included these same complaints of trial counsel’s alleged ineffectiveness in regard to jury instructions, witness perjury, and missing exculpatory evidence. Specifically, Funches argued

in his response that he had meritorious claims based on: (1) “trial counsel”[s] ineffective[ness] for failure to seek [a] lesser included offense jury instruction”; (2) “perjured testimony of [a] detective ... coupled with the trial counsel’s failure to present the summation of evidence to impeach her and prove the misconduct”; and (3) “ineffective[ness] of trial counsel” based on the State’s alleged “suppression of exculpatory evidence” on a surveillance tape. We rejected each of these theories when we affirmed Funches’ conviction in ***Funches I***.

¶10 We explained in ***Funches I*** that “no issue of merit could arise” from, *inter alia*, Funches’ claim that trial counsel should have sought a lesser-included offense instruction. ***Funches I***, No. 2010AP359-CRNM at 2. Similarly, we described and rejected “out of hand” Funches’ claims that “the detective who took his videotaped statement perjured herself,” and “that counsel was ineffective for failing to object to the State’s use of the surveillance tape which he asserts a police I.D. technician partly destroyed to suppress exculpatory evidence.” ***Id.***, No. 2010AP359-CRNM at 2 n.3. We added that our review “reveals no other basis upon which to found an ineffective assistance of counsel claim.” ***Id.***, No. 2010AP359-CRNM at 3.

¶11 Our conclusions in ***Funches I*** are no less controlling because we reached them in the context of an appeal under WIS. STAT. RULE 809.32. Such an appeal results in a “merits-based decision with respect to each of the claims raised.” See ***State v. Tillman***, 2005 WI App 71, ¶18, 281 Wis. 2d 157, 696 N.W.2d 574 (citation omitted). Funches received just such a merits-based decision in ***Funches I*** as to all of the claims raised or considered in that matter. He cannot relitigate those claims in a petition for a writ of *habeas corpus*. “A matter once litigated may not be relitigated in a subsequent postconviction

proceeding no matter how artfully the defendant may rephrase the issue.” *Pozo*, 258 Wis. 2d 796, ¶9 (citation omitted). Therefore, we affirm.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

